UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: VALSARTAN PRODUCTS LIABILITY LITIGATION

CIVIL ACTION NUMBER: 1:19-md-02875-RBK-JS

STATUS CONFERENCE AND ORAL ARGUMENT ON THE TAR DISPUTE INVOLVING TEVA AND PLAINTIFFS (Via telephone)

Wednesday, July 15, 2020
Commencing at 4:00 p.m.

B E F O R E: **THE HONORABLE JOEL SCHNEIDER, UNITED STATES MAGISTRATE JUDGE**

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(ALL PARTIES VIA TELEPHONE JULY 15, 2020, 4:00 P.M.)

THE COURT: We're on the record, Valsartan MDL, Docket No. 19-2875. Why don't we get the names of lead counsel for the plaintiffs and the defendants, and whoever else intends to talk today, put your name on the record and just like the other calls we've had, if you could just state your name before you speak, so the court reporter knows who's speaking.

Let's start with the plaintiffs.

MR. SLATER: Hello, Your Honor, Adam Slater for plaintiffs.

MR. HONIK: Good afternoon, Your Honor, Ruben Honik for plaintiffs.

MR. NIGH: Good afternoon, Your Honor, Daniel Nigh for plaintiffs.

MS. WHITELEY: Good afternoon, Your Honor, Conlee Whiteley for plaintiffs.

MR. STANOCH: Good afternoon, Your Honor, David Stanoch for plaintiffs.

MR. PAREKH: Good afternoon, Your Honor, Behram Parekh for plaintiffs.

THE COURT: And defendants.

MR. GOLDBERG: Good afternoon, Your Honor, this is Seth Goldberg for the ZHP parties and the defendants.

MS. LOCKARD: Hi, Your Honor, it's Victoria Lockard,

and I have Jeffrey Greene from Greenberg Traurig here on behalf of the Teva defendants.

MR. TRISCHLER: Good afternoon, Your Honor, Clem Trischler for the Mylan defendants.

MS. JOHNSTON: Good afternoon, Your Honor, Sarah Johnston for the retailer defendants and CVS.

MR. GEOPPINGER: Good afternoon, Your Honor, Jeff Geoppinger, G-E-O-P-P-I-N-G-E-R, for the wholesaler defendants and AmerisourceBergen.

THE COURT: The Court received the parties' letters including the letter sent late last night regarding the Teva issue. I'd like to save that issue for last, if you don't mind.

Mr. Slater identified two issues in his letter: The Teva issue and the status of the document production and the request for additional time from the, quote unquote, downstream defendants. Let's deal with that issue first, the request for extension of time.

I would just like to hear if plaintiffs have any position on that. I read your letter, I know you respect what the Court said at the last conference.

Is there anything you want to add? The downstream defendants have proposed that they do a rolling production August 14, September 14 completed, October 13.

Apart from what the Court said at the last

conference, do the plaintiffs have any strong objection to the request?

MR. STANOCH: Good afternoon, Your Honor, David Stanoch for the plaintiffs. Other than Your Honor addressing the request for the extension at the macro -- at the end of the macro issue briefing and denying that request, you know, the only other thing we would add, Your Honor, is that with respect to the retail pharmacy defendant, that the great amount of the documents and data requested and then issued here were agreed to way back in March when the parties were about -- when we were about to submit our macro issue briefing to Your Honor.

There were only two issues with the retailer pharmacy defendants, which was, one, how much the retailers paid to buy the drug, and No. 2, what the PPP paid when it was dispensed by the retailers. That's it. All the other data points they knew about and they had agreed to produce.

So, it would be, you know, our position that whether or not these defendants intended to do rolling productions during the macro issue briefing or not or whether they want to wait for the macro issue briefing was resolved, they certainly were on notice for months about the exact things they need to be start pulling and producing and could have been preparing that this whole time.

THE COURT: Okay. Defendant, let me take the wind

out of your sails. The Court is going to grant your request for an extension, but I just want to make a comment or two about what happened here. The only way -- you know this, from this and other cases, the only way that this case can efficiently proceed and manage is if the parties cooperate with each other, and if a group of defendants takes the position that they're not going to produce sample documents, so they're not going to produce exemplar documents and they're going to wait weeks or months until the Court rules on a bigger issue to produce a single piece of paper, you put the Court in a very, very difficult position to grant request for extensions of time.

If the parties work together and they cooperate and they meet and confer and they say to the Court, Judge, we've been working together but we have this tough issue and, you know, we need this time to respond and we've been working cooperatively, trying to move this litigation forward, that makes it so much easier for the Court, because then the Court can say, okay, the parties are acting reasonably and in good faith and if they make a legitimate request for more time, they get it.

So on a going-forward basis, what the Court would really like to see, and I don't want to argue, like, in my view, it's static because I know parties are going to deny it happened, but I really would like to see the parties to

continue to meet and confer in good faith, cooperate with each other and I am not a judge who thinks that every single discovery dispute has to be worked out if the parties meet and confer.

I understand how reasonable minds can disagree in good faith on different issues, just like the TAR issue, that's fine, but I would like to see the parties work cooperatively towards that goal and in all frankness and in all candor, I don't understand, if it happened, why groups of defendants or defendants were steadfast in their refusal to produce obviously relevant, plainly discoverable, sample exemplar documents that will help advance the ball in the litigation.

So that's all I have to say. We gave the defendants way back when what they wanted until November to produce their documents. We're going to hold their feet to the fire. The downstream defendants want this 90-day extension until October. They're going to get it. The order is going to require rolling productions, and let's just move on and focus on the merits of the case. Okay?

MS. JOHNSTON: Your Honor, this is Sarah Johnston for the retailer defendants. Can I just clarify a few things for just a moment? I promise not to take up too much time.

At first, you know, I take to heart what the Court is saying and certainly agree that cooperation on both sides is

key to getting this case moving forward, and I think that we previewed that in our submission to the Court yesterday that that is certainly what we're trying to do here.

I also would like to just clarify that this is, as to the retailer defendants, this is a situation where this is a group of defendants that sat back and waited to collect documents and then were waiting to push the ball forward on the discovery process until after the macro hearing.

But with respect to the Court's frustration on the exemplar issue, I just wanted to clarify for plaintiffs and the Court that again, this is not something that we understood to be an issue that affects the retailers because of the nature of the discovery that we negotiated with plaintiffs, the issue of exemplars was something that was not teed up as a necessary issue.

So I want to be clear that as to the retailers, we felt like we were working with plaintiffs and going along with what the Court had, in fact, told the parties as important and with respect to the specific request for an extension that the documents that we've been working to correct fall into really two big categories. There are the ones that are generally capable of being pulled and collected and reviewed and produced in much simpler fashion and then there are those that take a lot of work, a lot of costly and complicated efforts to collect, and then do all the non nightly processing and other

things we outlined in our letter, and we've been very clear with plaintiffs all along that that was going to take some time.

And related to that, those very difficult to collect types of documents that were -- that we outlined that would need to be fully vetted by the clients and processed in a significant and expensive manner were dependent on the Court's rulings on macro discovery. So we found ourself in a position where we could either guess what the Court was going to -- how the Court was going to rule, or we could run the various kinds of searches on it, on a contingency basis, where we were running them three or four times before macro rulings.

And so I just want to make sure that it's clear to the Court and to plaintiffs that we are very interested in continuing to work cooperatively and will continue to do so.

The extension is truly tied to some of these documents that could not have been collected prior to the hearing on macro discovery, and I think that the proposal we've outlined is fair and makes sense and will continue to keep the ball moving and we appreciate the Court's consideration in granting the extension.

MR. GEOPPINGER: Your Honor, if I may, Jeff Geoppinger for the wholesalers. I echo Ms. Johnston's comment and also commit that we will continue to work and meet and confer and move the ball forward.

I just wanted to clarify for the wholesalers that the schedule that you'll be entering will be applicable to all downstream defendants, retailers and wholesalers.

THE COURT: Yes.

MR. GEOPPINGER: Thank you.

THE COURT: Again, I want to save the TAR issue for last.

Mr. Slater, you had raised an issue about the status of production. Was there something you wanted to address?

MR. SLATER: Adam Slater for the plaintiffs, Your Honor. I just thought it was -- we, as the plaintiffs, thought it was a good idea just because the productions are supposed to begin today to just have a check-in to make sure that the productions were actually coming out to get some sort of an idea that the prioritization is being fulfilled, if the defendants can give some idea of what we can expect to be getting now in this first shot because there was some very, you know, specific orders about what should be produced, and we would expect really a significant percentage of what needs to be produced to be coming.

So we were hoping to get some sort of a report to the Court and to us to give us some comfort that, yes, they're following through, yes. I would think just for the Court's benefit to have that update and then, you know, we would go forward from there.

MR. STANOCH: Your Honor, this is David Stanoch for plaintiff. I hate to interject and go a half step backwards, and it's probably water under the bridge with the extension, Judge, but, you know, if the extension is for the retailers and the wholesalers, that's fine, I was just surprised to hear Mr. Geoppinger say that because he never came to us saying that they wanted an extension, and Mr. Goldberg's leave on counsel letter exclusively talked on behalf of the retailers and the burden about HIPAA concerns and anonymizing patient consumer data up to the point of dispensement. That's something the wholesalers don't have.

So, it is what it is and if that's the Court's ruling, we'll of course abide by it and we'll continue to work with both sets of them. I just want to put that on the record that the wholesalers were not part of the request either to us or in the letter to Your Honor.

THE COURT: Okay. I don't think there's anything else to be said on the extension issue. Frankly, rightly or wrongly, the Court understood that the request was being made on behalf of both groups, and if I was wrong about that, so be it, but I do think -- I don't think that plaintiffs are going to be prejudiced by this and there is some symmetry to it, so let's move forward.

But I think Mr. Slater's idea about getting a check-in on if everything is in place for the production today

and what plaintiffs can expect, and is there an issue about prioritization, makes sense.

So why don't we start with ZHP and then go through all of the manufacturer defendants.

MR. GOLDBERG: Thank you, Your Honor, this is Seth Goldberg for ZHP. I just want to clarify for the Court, you may recall that the text order that Your Honor entered, No. 416, required that for the production today, it would be comprised of documents that were in the possession of defendants' attorneys for ESI Consultants at the time Your Honor entered that order, and that defendants used reasonable good faith efforts to produce those documents by July 15th or to begin to produce those documents by July 15th, and, for that -- that's what's due today, that's what the order says about production today.

And at least for ZHP's part, we were not in position to produce -- we had not collected that kind of information and did not have a production due today, but are nonetheless going to be producing documents today.

You may recall this order was entered before ZHP had begun to collect information because of the COVID issues. But notwithstanding that, ZHP has assembled documents to be produced today and we'll be doing so.

THE COURT: Let's go through all the defendants.

MS. LOCKARD: Your Honor, it's Victoria Lockard. I'm

happy to speak on behalf of the Teva defendants. We are also making a substantial production today currently being prepared with a focus on the items that have been prioritized by request by the plaintiffs and that includes the noncustodial production for the categories that were identified in plaintiffs' letter and a custodial production from the priority custodians who were identified in plaintiffs' letter.

And this includes again, you know, our good faith effort to produce what was in our ESI vendor's possession, as well as some additional items that we endeavor to collect in the noncustodial pool.

We, you know, will save the TAR issue for the end of the call, as you requested, but I want to confirm for the Court that that has in no way slowed down our efforts and it has facilitated our ability to produce the documents by today's deadline. So, we will get into the specifics of that at the end of the call.

THE COURT: Can I go back a step, because maybe I'm wrong about this, but the Court's order that Mr. Goldberg cited to, Docket No. 416 entered on April 20th, 2020, says: "These defendants shall commence the rolling production of the documents required to be produced in Document No. 328, by no later than July 15, 2020."

And if you go back to 328, 328 is the order that approved the document request, and I think that an original

production date of whatever it was, March 1.

So, Mr. Goldberg, where's the limitation that you discussed derived from?

MR. GOLDBERG: So, Your Honor, I -- if Your Honor goes further into the order that you referred to, it starts with the next sentence: "The defendants shall use reasonable good faith efforts to comply with plaintiffs' prioritization and to the extent responsive documents are currently in the possession of defendants' attorneys or ESI Consultants, defendants shall use reasonable good faith efforts to produce the documents by July 15th, 2020."

Your Honor may recall that at the time this order was entered in the case management conference we had that preceded this order, we had raised with the Court -- we had a very lengthy discussion with the Court about the difficulties that different parties were having with respect to collecting and producing documents in light of COVID-19, which, you know, April of 2020 is when it really was presenting a problem and resulted in this new schedule, and there was discussion on the record about the fact that some defendants had not begun to collect documents by the time of that case management conference, ZHP in particular, because of the timing of COVID-19, and that's what led to this sentence about this No. 5 in the order about -- to the extent responsive documents are currently in the possession of defendants' attorneys

whereas -- ESI Consultants, then reasonable good faith efforts to produce those documents should be made. And --

THE COURT: I got it, Mr. Goldberg. Thanks for clarifying it for me. Thank you very much.

So we heard from ZHP and we heard from Teva. The other defendants, who are they? Aurobindo, Hetero, I think there's one more.

MR. TRISCHLER: Your Honor, Clem Trischler. Mylan is the other one, I believe.

THE COURT: Oh, Mylan, how could I forget Mylan.

MR. TRISCHLER: Which is my client. I wish you would.

(Laughter.)

THE COURT: Not me, Mr. Trischler. The plaintiff, you want plaintiffs to forget Mylan.

MR. TRISCHLER: I understand and I concur.

THE COURT: So where does Mylan's production stand?

MR. TRISCHLER: Well, Your Honor, Mylan is making the first of its rolling productions today, much like does ZHP and Teva, we attempted to consider in good faith the plaintiffs' prioritization schedule. I believe when plaintiffs have an opportunity to go through the production, they'll see that we produced a number of materials that are on the prioritization schedule. I don't pretend to have it all committed to memory, but I believe some of the things that were asked for were

things like quality supplier agreements, certificates of analysis for the API, Valsartan finished dose testing information, SOPs. All those things are included in today's production.

Obviously, there's still other materials to come. I would not suggest or represent that everything on the plaintiffs' prioritization schedule or everything on the request for production of documents is being provided today, but I certainly believe we've made a good faith initial production of a multitude of items that were on the plaintiffs' priority list and we're working diligently to complete the production and I don't see any reason why we would not be able to do so on a continual rolling basis by the end of November.

THE COURT: Okay. Terrific.

Are there any other defendants who are subject to the order requiring a rolling production today? We did ZHP, Teva and Mylan. Is that it?

MS. HEINZ: Hi, Your Honor, this is Jessica Heinz for the Aurobindo defendants. We will also be making a production today. It is based on the plaintiffs' prioritization letter as well, and it's also going to be an additional -- or a supplemental core discovery production on behalf of all of the Aurobindo defendants as well.

THE COURT: Terrific.

Hetero, are you on the phone, Hetero's counsel?

MR. SHAH: Yes, Your Honor, good afternoon. This is Nakul Shah on behalf of the Hetero entities; Hetero Drugs and Hetero Labs.

Your Honor, we're preparing and finalizing our first ESI document production two weeks in to plaintiffs by the end of the day today and we've also made a good faith effort to keep in mind the plaintiffs' prioritization schedule. We additionally completed our core discovery productions, I believe it was this morning.

THE COURT: Terrific.

Okay. So now we have a status, Mr. Slater.

Are there any other issues that anybody wants to address before we get to the TAR issue?

Okay. I had one question before we get there. Are we going to finalize all the fact sheets to be entered by the end of the month?

MR. SLATER: There's an order that we are, so we are.

THE COURT: Okay. As I see things, and correct me if I'm wrong, once we get those fact sheets entered, I could be wrong about this, but the case will be in a little bit of a hiatus while the defendants produce their documents, while the plaintiffs finish their fact sheets and maybe, maybe not, we'll talk about that at the end of this call. Maybe we don't need the mid-August call next month. We could have it at the

end of the month. But I just foresee, you know, you've been working hard after we picked up after the COVID lapse, the last month or two or three. The next few months is going to be focusing on the document and ESI production, issues come up like they always do, but probably come September, it's time to start thinking about the next phase of the case, you know, getting the 30(b)(6) deposition notices cleaned up and dealing with those objections which are invariably going to come.

So I'm talking about who is going to be deposed, how many deps, where they're going to be taken, et cetera, et cetera.

So I think we're in pretty good shape through the fall, and I anticipate, like I said, we may start depositions December/January of the defendants. They could start earlier if the plaintiffs want to. I guess we could talk to the defendants about when they want to start taking plaintiffs' depositions since they'll likely have the information they need to take those depositions sooner rather than later.

So the long and short of that is, I think we're in pretty good shape.

Let's get to this TAR issue. I read the papers. I don't think it's appropriate for the Court to make a ruling on the TAR issue today because at least plaintiff ought to see what the production is that Teva is making, and then I know I had a few questions that I'd like to address with Teva about

this TAR review and I anticipate -- since this issue only came up very recently, that there might be continuing discussions amongst the parties that might result in a resolution of this issue.

But one of the questions I had for Teva was: What's the difference between TAR 1.0 and TAR 2.0?

MS. LOCKARD: And, Your Honor, I'm going to turn this over to Jeff Greene from Greenberg who's our eDiscovery counsel on this. So I think he's best suited to answer these kind of questions.

MR. GREENE: Good afternoon, Your Honor, this is Jeff Greene from Greenberg and a pleasure to be here before your Court.

So the direct answer to your question is, TAR 1.0 was more sort of affectionately known as predictive coding, and the process associated with how the computer learns is really what makes the difference between TAR 1.0 and TAR 2.0.

In TAR 1.0, there's a seed set training process and basically what that training process is, is there are any number of two to 400 documents in a seed set that are reviewed, and the decisions with respect to the, you know, review process are loaded into the -- into the black box, if you will, into the computer system, and the computer then looks at it and says, okay, we've generated assembling of 400 documents and there's a couple different ways you can train

the system. You can train it by loading documents in that we already know are responsive and use that as a starting point, or you can say, give us 400 random sample documents from a variety of custodians and so on. Those documents are reviewed and those are loaded into the system, and then what the computer system does is say, okay, I'm going to give you another 400 documents and those documents are reviewed, and each time what you should expect to see is the computer get smarter based on the decisions that are made by the reviewer.

So if the first set, for example, might only have 10 percent response to documents, first set of the first seed set of 400. The next set might have 23 percent. Those seed set reviews continue, and sometimes the system gets what I'll call stability, very quickly. And what I mean by "stability" is the reviewing seed sets, maybe you get to 75 percent or even 85 percent that are responsive. And once you get that system, what I'll call system stability, you've then sort of reached the end of the exercise.

And in my experience, Your Honor, I've done dozens and dozens of these things, sometimes it takes a relatively small number of documents, three or 4,000. Sometimes it takes 20,000 documents or more to get stability. In other words, that the system is generating -- the sets of documents that the system is generating are consistently responsive, and, you know, generating a high degree of recall and precision, which

basically means it's hitting on the document it should hit on, these are the responsive documents, okay?

TAR 2.0, sometimes called Continuous Active Learning, in our case it's CMML, is a little bit different. That process is, we basically just start reviewing documents and there are no seed sets to review, it's functionally we start reviewing and we keep going and rather than getting -- trying to get system stability, what we're looking for, what the system is trying to do is rank the documents to give them a score, if you will, with the most responsive documents being scored 1.0 and the least responsive documents being scored 0.0 or 0.01.

And what that does, as the more documents are trained, the system gets more intelligent, if you will, and, you know, basically percolates to the top of the stack the most responsive documents and it moves the nonresponsive documents down to the bottom of the stack. And so there's a ranking of zero to 1.0. Each document has a score.

And so what you do is with a CAL process or a TAR 2.0 process, is you continue to review documents and sometimes you may review all the documents, but what CAL allows you to do is prioritize the most responsive documents first.

What you can do, Your Honor, though, is CAL can also allow you to look at documents and say, it's no longer necessary to review documents because you keep reviewing

documents that are scored with a .2 or a .1 or maybe a .3 and those documents absolutely aren't relevant. So we may go down and review, you know, a hundred documents from that set and not one of those documents is responsive, and so the CAL system can say to you functionally, hey, look, we're not seeing any more responsive documents in this batch, you know, from here on.

You, counsel, can make the determination, if you so choose, to stop at this point, from a statistically significant perspective, you've reached, you know, you've reached your goal of finding the responsive document.

So the main difference is how the systems are trained, the difference is what the end result ultimately is, and what CAL does is it says, it basically ranks the documents. What predictive coding or TAR 1.0 is, basically it says, we're going to give you a batch of documents that we're sure because the system is stable, that we're sure are responsive and everything else absolutely is not responsive or looks nonresponsive.

CAL, you know, CAL is, I don't want to say it's new, but TAR 2.0 coming out, you know, almost a decade ago and the predictive algorithms behind it have been in place for decades. But the original cases, the *DaSilva Moores*, the *Rio Tintos*, all those cases from Judge Peck, those initially were TAR 1.0 cases. But now we're seeing the prevalence of TAR 2.0

and it's a much more sophisticated technology. It learns the lessons that, you know, from TAR 1.0 and allows us to prioritize the documents and get them to plaintiffs -- into plaintiffs' hands faster, quite frankly.

THE COURT: Let me ask you a question.

MR. GREENE: Sure.

THE COURT: This is hypothetical, of course. Hypothetically, let's say Teva has a thousand documents to review. The search terms that the Court ordered, they run those search terms. 500 documents are hit by those search terms. Does this TAR program review the 500 documents or the thousand documents?

MR. GREENE: It can be done either way, Your Honor. Our approach --

THE COURT: What's Teva doing?

MR. GREENE: Our approach would be to layer the CMML algorithms across the documents that hit on the search terms.

THE COURT: Correct.

MR. GREENE: But it can be done either way.

THE COURT: All right. This is an important point for today's purposes.

For today's purposes, okay, the production that Teva is making today, as I understand it, these were the documents that were the highest priority that came up in this program that -- in other words, Teva has not yet gotten to the point

where it says, every document scoring below X that has a hit, we're not going to review. Am I right about that, that decision hasn't been made yet?

MR. GREENE: Yes, Your Honor, you're correct.

THE COURT: All right. So when do you anticipate that Teva is going to get to the point, because it seems to me that's what plaintiffs' biggest concern is, that how is the decision going to be made that a document that hasn't hit is, quote unquote, not responsive? In other words, irrelevant, right?

MR. GREENE: Correct. Well, so obviously, Your Honor, we're doing a rolling production and I think the -- you know, with respect to the priority custodians, we should know that in the not too distant future, within a week or two at most with respect to the priority custodian.

The suggestion I have, Your Honor, is that -- you know, and we truly take this in the spirit of the cooperation from *Sedona* and all those cases that say you have to cooperate. I think, you know, what you saw from the submissions is that, you know, the parties tried to meet and confer and it didn't really go anywhere. I think there's obviously some, you know, concern amongst plaintiffs about the use of CMML and the use of CMML to, you know, to narrow the scope of what documents need to be reviewed.

We have, from our perspective, Teva has complied with

the terms of the ESI protocol and, you know, we've not yet reached the decision, and I will be frank with Your Honor, I do expect us to get to that point where we -- we'll leverage the Teva -- the CMML decisions to restrict or to eliminate certain documents review population.

My suggestion to Your Honor is in the spirit of cooperation that you were talking about is, if there are concerns about the, you know, the validation, if you will, associated with restricting the number of documents to be reviewed or limiting the dataset to be reviewed, my suggestion is that, you know, let's engage in a reasonable meet and confer process, a productive one where the parties, and this should not necessarily be limited to Teva, but if there are other defendants who intend to use our or some sort of predictive coding or some sort of CAL or CMML exercise, we all get together and we negotiate a protocol for the use of technology and which would include the validation concepts that I think plaintiffs are most concerned about.

Because at the end of the day, their concern that, hey, there's this huge batch of documents that are going to be pushed to the side and, you know, and not -- and not reviewed. I think the validation concepts that, you know, if you look at some of the decisional case law that's out there, and I'm speaking specifically of the In Re: *Broiler Chicken* antitrust litigation which is in the eastern -- the Northern District of

Illinois, that gave us a really good idea of what a validation protocol could look like. And I think if the parties were reasonable, and rather than just saying, no, you can't use CMML, we sat down and I would say cooler heads prevailed, we could say, let's negotiate a reasonable protocol for the use of TAR or CMML and for -- that includes a validation process to allay any concerns that plaintiffs may have about documents that don't actually get reviewed at the end of the day, in other words, limiting the dataset which is required under the ESI protocol.

And, you know --

THE COURT: Let me see if I understand -- I think I understand what you're saying and I just have a couple more questions, then we'll hear from plaintiffs. But I think what you're saying is, Judge, we haven't yet reached the point where we're not going to review documents for which there's a hit. Eventually, we're going to get to that point, Judge, and we're agreeing to meet and confer with the plaintiff to see if we can agree on some type of validation or process, what have you, that would trigger the ability of Teva not to review every document where there's a hit.

MR. GREENE: Your Honor, I couldn't have said it better myself.

THE COURT: Well, yes, you could have.

(Laughter.)

MR. GREENE: Your Honor, the only caveat to that would be not necessarily just Teva, but if there are other defendants who are considering using this technology, let's get their input too.

THE COURT: Okay. One more question, or one to two more questions. Take TAR out of it. Suppose you -- apparently, there's people who aren't using TAR or companies that aren't using TAR, or go back a few years. There's a million documents to review. There's 200,000 hits. If you're not using TAR, does each one of those 200,000 documents get reviewed to determine if it's relevant to the case by hand?

MR. GREENE: So the answer to that question would be yes, and that's just because of the nature of the -- of a brute force linear review, it has to be. I mean, it would be -- I'm not sure how we as attorneys could uphold our obligation to the Court by not reviewing every document. If you were not using CMML or CAL, if you were not using technology, you would have to do that, and, you know, the sophistication of the algorithms in connection with, you know, these systems allow us to do that.

They allow us to prioritize the documents that plaintiffs have asked for, and, you know, these systems are inherently flexible so that we can, you know, if we need to make training on the fly so as to account for two documents that enter the work stream, we can do that.

A linear brute force review, Your Honor, and not only being less accurate, and this is well-documented by any of the reports written by Maura Grossman and any of the studies that are out there from the Georgia Institute and so on -- Georgetown, you know, linear review is well-documented to be far less reliable than technology-assisted review.

So what we're getting -- what I'm getting at, and I'll try and keep it short is, we're able to produce the most -- you know, the most responsive documents at the earliest stage of discovery to plaintiffs and it's a more reliable dataset than, quite frankly, than using a linear review.

And so where our position is, this should benefit plaintiffs. And, you know, we're a little perplexed as to why they object to this because there's any number of cases where plaintiffs have tried to foist TAR onto opposing parties and it is black letter law, Your Honor, that -- and I'm sure you know that, you know, the responding party is in the best position to choose the review and production methodology, and that's not what we're trying to do here.

So to answer your question, I think you would have to go through every one of those 200,000 documents, but that's just the nature of the beast with linear review.

THE COURT: Does TAR also do a privilege review?

MR. GREENE: TAR does not do a privilege review in sort of the traditional sense. What we would do in that case,

Your Honor, and what we're doing here is, we would run what I will call a privilege screen across documents and that privilege screen would say, for example, find all documents that say Jeffrey Greene and Victoria Lockard and so on, and it would pull those documents out and park them somewhere. Those documents would then be reviewed. So attorneys' eyes do go on those documents for sure, because we do have to make a -- we do have to make a true privilege call and actually prepare a privilege log.

So if there was a document that, you know, said, you know, that had the words "Jeff" and "Green" in it, Green without an e, as opposed to my name Greene with an e, the system might see that and say, hey, this document looks privileged, but when we put attorneys' eyes on it, it proves not to be privileged. So TAR would not exclude or this technology that we're using would not be used to exclude privileged documents. We would use a filter for that, but then attorneys' eyes would be on every document.

THE COURT: One more question. Go back to my hypothetical. My hypothetical, 1,000 documents, 500 hits. You do your TAR review and it determines which of those 500 are most responsive and it decides, we're going to take your first 250. So to date, no one has put their hand on the document, after it goes through the hit review, after it's at the top of the priority list, is it then reviewed by someone

before it's produced or is it produced just based on what the computer says?

MR. GREENE: So in -- and I'll be specific in the case. So we're making a production today, Your Honor, I think it's around 70,000 pages and something like 12,000 documents, and every single one of those -- attorneys' eyes have been on every single one of those 12,000 documents. We've not done any, you know, cutoff on the way up either, which is to say, hey, we're going to say everything above a score of .5 is responsive and, therefore, we're going to turn that over.

We're looking at this because frankly, Your Honor, we don't want to produce -- the system may -- could be wrong in a score, although it's usually not, but, you know, if there's a document, for example, that the system scored highly, but it actually has no relevance or responsive to the case, you know, we would lay attorneys' eyes on that and, you know, we may make a decision in rare circumstances to say, no, that's not a responsive document. The system learns from that. We do take that document out, but every single document we're producing today has been reviewed.

THE COURT: What happens ten months from now when the system is up and running, it's been validated, test runs, whatever you do, and then you hit a certain number and it's nonresponsive, above a certain number, it's responsive. Are the responsive documents reviewed by a live person before

they're produced?

MR. GREENE: The answer to that would be yes, although I'll qualify it by saying, you know, in general, Your Honor, they don't have to be, but in our case, I would say they will be.

THE COURT: Why?

MR. GREENE: To ensure two things, really, or maybe three things. To ensure there's no information in there that, for example, doesn't relate to other products, that would be one, you know, trade secret proprietary information that, you know, we need to be obviously concerned about. We also would look at it in terms of if a document, for whatever reason, missed a privilege filter, that, you know, it -- words that just didn't -- weren't in our privilege screen, want to review that document as well, and then the fourth, Your Honor, is we don't want to produce nonresponsive documents, so we would be reviewing those for those criteria.

THE COURT: All right.

MR. GREENE: Then the fifth probably, Your Honor, is we want to know what documents we have in our case. We need to look at the documents too.

THE COURT: I think we might have just hit the nail on the head, okay? And I anticipate Mr. Slater is going to jump all over this.

If you're so concerned that the documents that get a

high score have a legitimate high score and you're reviewing those with a live person, if I was the plaintiff, I would say, well, why don't you do the same for the nonresponsive documents. Why don't you double-check them to make sure that there's no responsive information on them that should be produced, that you're checking the responsive documents to double-check that they're responsive, but you're not checking the nonresponsive documents to double-check that they're nonresponsive, right?

MR. GREENE: Actually, Your Honor, that's not right, and I apologize if I wasn't clear.

Earlier when I was talking about *DaSilva* being a TAR protocol, I made the reference to a validation protocol and what the validation protocol is, Your Honor, is -- it's that very thing you just described, which is we do sampling exercises of the nonresponsive documents by a human reviewer. So we get sets of hundreds if not thousands of documents from the nonresponsive batches. So documents that have been scored lowly, right, if that's such a word, the documents that have received low scores, we do a validation exercise, and this is something that we would agree with plaintiffs on if, you know, if we could negotiate in good faith with them, that we have a process.

At the end of this exercise, that said, we will agree to do the following: Review 500 documents here, 2,000

documents there, 2500 documents here in batches, and we will share the results of those reviews in terms of metrics. So if we review 5,000 documents and 50 of those documents prove to be responsive, then, you know, that may drive two things. It may drive a little bit more work in terms of making -- you know, sharpening the algorithm to make sure we capture those documents.

But that validation exercise at the end is a absolutely critical process to prove what we did was right and to prove that we were reasonable and defensible in our approach.

So we would never, Your Honor, just say we're going to stop somewhere and not look at those. We're going to look to, you know, the sample of potentially thousands of documents, but, you know, it can depend. And you look at those samples and say, of these 5,000 documents or 500 documents or whatever it is, how much of it was actually, you know, deemed responsive, and you can do those on a random sample basis. There's any number of ways you can generate those samples, whether it's by custodian, whether it's purely randomly, but -- and there are a variety of different ways to generate subsamples, but I think the way to approach this, Your Honor, is, let's get an agreement on how to do a validation protocol, which is not heavy lifting if everyone is cooperating, and that will, you know, give plaintiffs and

defendants for sure the confidence that we've looked at the responsive material, but we've also conducted a very significant -- statistically significant sample of the nonresponsive material to prove that we're right.

THE COURT: Okay. But I keep on saying last question, and this is my last question. The validation process that you're talking about for the nonresponsive documents, are you doing that same or similar validation analysis for the responsive documents, or are you reviewing every single document that's produced?

So, in other words, you're double and triple-checking to make sure documents are responsive, but with regard to the nonresponsive documents, it's going to be a validation process.

MR. GREENE: Not exactly.

THE COURT: And I'm guessing that's where plaintiffs' concern is. I'm guessing. I don't know.

MR. GREENE: So one of the things about CAL is that -- and this is an important thing to remember, is that it is a continuous process, right? It's Continuously Active Learning, and so, you know, we can discuss a validation process to be used, I don't want to say at the end of this exercise, but we've already done what are called allusion test samples of the priority custodians, you know, that we're producing today. And what that means, Your Honor, is it's a set of documents

and, you know, it's around a thousand documents, I believe, and, you know, and this is for our own purposes, this is not necessarily to prove anything to anyone but we want to make sure we're right here.

So we reviewed 800 to a thousand documents from the nonresponsive set for these priority -- for the priority custodians that we're producing today, and of those, I think it's 800 to be perfectly honest, I think of those 800 documents, all of 14 -- only 14 documents proved to be, you know, responsive. In other words, 786 documents the system got right, and we looked at every single one of those documents, attorneys' eyes, and the system proved to be right 98, ninety -- almost 99 percent of the time. And so that gives us great confidence.

So there's a validation protocol certainly at the end of the process or, you know, whether we do it on a priority basis, that can be discussed as well. But we're constantly checking ourselves to ensure that, you know, the documents we have are the right documents. So -- and, you know, we're happy to provide those statistics to -- or those metrics to plaintiffs and that would be part of a validation protocol, which would be built into a larger TAR protocol. But at the end of the day, I think, you know, the answer is, it's a constant process of proving to ourselves, proving to the Court, because that's obviously our obligation, and then

obviously proving to plaintiffs that we've met our obligation. There's no doubt that this technology works. Courts all over the country have adopted it and it can be used here.

And so, you know, for that reason, I think if you give the opportunity, you know, the parties, say, hey, by July 30th, 31st, whatever it is, sit down, bash out any discovery TAR protocol, come back to me in two weeks or in a month or whatever it is, it's not going to slow us down. We're going to keep reviewing, we're going to keep doing all the tests and all the validations we'd be doing anyway. That's the logical thing to do here.

And I don't want to tell the Court what to do, but if I were to tell the Court what to do, that's how you play this is, let's get together, cooperate, get everyone in a room or Zoom and bash this out. It's not that difficult.

THE COURT: Mr. Slater, it's time for me to be quiet and let you speak.

MR. SLATER: Thank you, Judge. And, you know, fortunately through the Benicar years, you taught me to ignore static, so I'm going to ignore static.

THE COURT: Yes. And I know you're going to -- please don't say that, why did they wait until July 1st to tell us about this, because I know that's going to be a burr in your saddle. It is what it is. We can't do anything about it. So let's move forward and not backward, all right?

MR. SLATER: Yeah. No, let's move forward, Your Honor. But everything that you've just heard you can pretty much reject as having any relevance to this case at this point. I'll tell you why. You know, Mr. Greene talks nicely about CMMLs and TARs and all these things, and this would have been a wonderful conversation to have a year ago, but the idea -- and I'm going to take this word from -- remember, the defense cited case law to us to justify what they're doing, and we used those cases in the briefing we submitted to the Court.

So I'm going to quote to those cases and I'm going to talk about the law and I'm going to talk about the precedent where defendants have tried exactly what they're trying to do here and tell you about the mischief that's being perpetrated, and it's insidious and it's a serious, serious problem that I'm very concerned about.

So what the Judge talked about in the *Progressive Casualty Insurance Company verses Delaney* case, where almost this exact same scenario played out is that you don't get a do-over. What the Judge did, he took a defendant who agreed to a search term protocol, a protocol whereby manual search terms as we have, one, Your Honor, ordered last year and then to the consternation of the plaintiffs and the Court, the defendants came back this spring and upended that and we then had to spend months of negotiation and arguments with the

Court before we finally got to the point where the search terms could be modified based on representations by every defendant, including Teva, that the reason the search terms needed to be modified was because they were pulling too many documents, such that it was going to be unmanageable without the search term modifications for them to manually review the documents under the existing protocol that was agreed to and in place in this litigation.

Understand, Your Honor, this TAR application is not intended to be applied to a post-search term application of documents. It's not being used the way it's intended to. What they're doing, and I'll go through what they're doing, because it is transparent and insidious.

What you're supposed to do with TAR is you're supposed to take the entire document set and you're supposed to have both sides come up with the definitions of the tags that are going to be used to define a document as responsive or not.

The first massive roadblock that we ran into when we said, look, we'll at least talk to you even though we have serious concerns about where you're driving this, and Your Honor is exactly right, they're ultimately driving this to try to block documents from getting to us. We said, let's talk about the definition of responsiveness you're using, let's talk through that and they would not tell us. They said that

is our own private privileged information, you, the plaintiffs, don't get to know because we have complete control over this process and we're only talking to you as a courtesy.

We tried to talk about how the technology was going to be applied in terms of how you are going to recheck the testing, and it wasn't just me on the phone, it was myself, Mr. Parekh and Mr. Jaffe, our expert on this. They couldn't get an answer to any of their questions either, how are we going to have input into this process?

And the answer was, you're not going to, plaintiffs, we're going to do this and we're going to do it and you're going to be very happy that we did this for you is essentially what the back and forth was.

Now, if you look at their own white papers, they talk about the fact that this is an alternative to search terms, not an adjunct.

What they're trying to do now is this: First, they run the search terms, which we in good faith limited, we never in 10 million years would have engaged in that negotiation and those limited those search terms the way we did the last few months if we were told, well, we're also intending to overlay this with a TAR process that's going to end up with a reservoir of documents that are going to be not reviewed. And whatever systematic testing or whatever they say they're going to do, there's no way this is for our benefit. The idea that

this is somehow for our benefit, that's laughable.

The only reason they're doing this, cause first what they do is they take their entire document set and they narrow it with the search terms, then they run their TAR, they further narrow. Then for the documents, as Your Honor pointed out in your questioning of counsel, that they find to be producible and not privileged, they still review them and they still will pull some of those documents out and not produce them.

So they have three levels of review to try to narrow what they give us and they want this blessed by the Court, which we absolutely object to. We believe that this should be rejected today, Your Honor.

And by the way, the fact that they ran this after we objected. They told me on the telephone when I asked them if you've done this yet, they told us no when we spoke to them on the phone. The fact that they went ahead and did it, I suppose the only issue is going to be the flow of production, which is something I'll get to, maybe that even they've upended to some extent how the documents would have flowed to us otherwise. And by the way, 70,000 pages they're producing today.

I want to go back, Your Honor, when we had put on issue No. 1 and I was very quiet during that. When you got these representations from the defendants that they're all

complying. Teva is producing 70,000 pages. Big deal. Your Honor well knows 70,000 pages is a drop in the bucket. That's nothing. And the other explanations you got are nothing.

And to digress for one moment, no other defendant has ever raised the possibility of using TAR, ever. We've asked about it, I have transcripts going back to November of 2019 when Mr. Goldberg said he would talk to us about it, we had discussions and they all told us, we're not doing it. Because if we knew they were going to do it back then, Your Honor, we would have a meet and confer, that would have taken several months, the Court would have managed it, we would have had multiple lengthy meetings, we would have ended up in front of the Court if there were disputes, which there likely would have been in terms of our input and involvement, and it would have been hammered out and it would have been in writing just like the cases that we have submitted to Your Honor.

But that didn't happen because they never intended to do it. When counsel just suggested to Your Honor, let's get the other defendants on board, too, to start doing this also? So now they're all going to redo the entire protocol and now they're going to layer a new TAR protocol on top of search terms, narrowed documents, which is completely improper under their own white papers and their own methodologies. We categorically reject that, object to it, et cetera.

Let's go back to the *Progressive Casualty Insurance*

case. They -- I'm looking at Page *9 because it's a Westlaw citation. This is their case. The Court said: "Had the parties worked with their eDiscovery consultants and agreed at the onset of this case to a predictive coding based ESI protocol, the Court would not hesitate to approve a transparent, mutually agreed-upon ESI protocol."

However, this is not what happened, and then the Court talks about the fact that the defendant *Progressive* agreed to search the universe of documents using search terms.

Then the Court talked about the fact that the proposal by that defendant *Progressive Insurance Company* was, okay, we want to replace the manual review with the TAR review. And the Court said, you don't get a do-over, especially where your proposal lacked transparency, because we've already been doing this, that Court said, for so long.

Well, Your Honor, we've been working this for almost a year now, the search term methodology. We have broken our backs and that includes the Court, broken our backs to try to get a search term protocol in place based on false pretenses. Because for them to now come up at this point in the game and say, well, now, we want to layer this other methodology which is not intended to be run on the narrowed set of hit documents, the search terms, but is intended to be run on the full document set would be completely contrary to the actual literature from the application seller, this Brainspace

company that they told us is where they get this from, and we give them multiple opportunities to exclude documents.

So what did the Court do in the *Progressive Casualty Insurance Company* case? The Court said, the only way you can use TAR is with, and I'm quoting: "Unprecedented degrees of transparency and cooperation among counsel in the review and production of ESI responsive to discovery requests." And the Courts have required the producing parties to provide the requesting parties with full disclosure as to everything.

Now, they don't want to do that here. They wouldn't tell us the definition of responsive and then it got worse from there.

So now put this distraction on the plaintiffs at literally the last minute would be enormously and catastrophically prejudicial to what we're doing. We don't have a quiet time now. We're going to get hit with all the documents and now what we're going to have to do is we're going to have to be able to come back to the Court to show you all of the gaps in their productions and how they didn't prioritize.

But I didn't hear one defendant actually tell us that all the chromatography has been produced today. I mean, if they haven't all produced their chromatograms and their mass spectrometry, the key testing, then there's a serious problem in this litigation, if they thought that that was going to be

accessible. We're going to be in front of the Court, there's no doubt, based on the representations we've heard from counsel.

So now, while we're dealing with that, we're about to get hit on Friday with the motions to dismiss. So all of our leadership, all of the people that are running the most important critical decisionmaking are going to be dealing with that. We, by the way, served the deposition protocol last week for fact depositions on the defense. While all this is going on, they want us to now engage in a meet and confer on ESI for TAR that should have happened last year before the search terms were put in place, and at the worst, should have happened in January when they were supposed to have already started looking at their documents.

Remember all the representations Your Honor got. Those papers still exist when they said, hey, we're getting too many hits, this is too many documents to review, we have to narrow the search terms. They have to live by what they told the Court and they have to live by the representations they made and at some point, the buck has to stop and I think today is the day, Your Honor. Now they have to actually live with what they told the Court and what they represented and they got judicial intervention on their behalf.

That sounds like judicial estoppel to me where they said, we need to narrow these terms being we're doing a search

term review. To now come in with this other set of criteria, and I mentioned this before, Your Honor, this doesn't only end up with this reservoir of -- what we expect to be a massive quantity of documents that they're never going to review, but what it also does is changes how documents are prioritized for production, it changes the flow.

And, Your Honor, we gave you very detailed information in that letter. I think you can appreciate that Mr. Jaffe spent a lot of time consulting with us and helping us to write that letter to Your Honor so that we could lay out for you in detail why it is that from a technical perspective, their proposal, especially in the black box that they have kept it in during our negotiations, would create so much mischief and would change what we're going to get and when we're going to get it. And, for example, Mr. Jaffe gave us language that we put in that letter about some documents that will have very few of the indicia that will lead to this manual learning application, pulling those documents, which will be some of the most important documents of litigation, and the search term methodology we have in place guarantees us that a good faith reviewer will look at that document and say, you know what, that has to be produced. It's harmful, but, you know, the way it's worded, maybe it only has one of the search terms in it, but that's clearly relevant, you get it.

Their system puts it into the reservoir of we may not

need to review this document. It gives them tremendous control over this, and again, TAR can never be imposed in that way.

Now, I've spoken for a while. I want to just say one other thing. The *Mercedes Benz* case, Your Honor, which is a well-known case now and it's 2020, you know --

THE COURT: That's a funny case, because there, the plaintiffs wanted to use TAR instead of the defendants.

MR. SLATER: Absolutely. And what did Judge Cavanaugh say? Judge Cavanaugh said, "The defendants here object," I'm on *2, "object to the use of TAR, instead indicating they prefer to use the custodian and search term approach which they assert is fair, efficient, and well-established."

Now, this is 2020. This is the system that every other defendant in this litigation has said they're using, even Teva said it until recently that that was -- saw where they were doing it and they called this archaic. So this is 2020. And what did Judge Cavanaugh say? He said, "However, defendants are cautioned that the special master will not look favorably on any future arguments related to burden of discovery requests, specifically cost and proportionality when defendants have chosen to utilize the custodian and search term approach despite wide acceptance that TAR is cheaper, more efficient, and superior to key word searching."

That language is critical. Your Honor, we put in the provision in the ESI protocol that we were willing to talk about putting a TAR provision in, because plaintiffs like it if it's done the right way, if it's going to be negotiated fully, fairly implemented with input from both sides. And I'll point Your Honor to a case I cited -- we cited in our letter, the *Actos* MDL, a litigation like this one. And what did the Court say about Actos in the -- another case that the defense cited, *Rio Tinto* that Teva cited where it quotes right from *Actos* that the reason that worked there at *Actos* is because the parties agreed to let their, quote unquote, experts work together the whole time to run the TAR, to validate the documents as they went, to relearn, reteach. So both sides did it together from the beginning.

That's what we would have agreed to here and we think that's what would have been ordered because it would have been the only transparent way to run it here, but they didn't want to do that.

So if you take what Judge Cavanaugh said, who was acting as a special master in the *Mercedes* litigation, he said you can't do what they're doing right here. You can't come back and redo it, and that's what the Judge in the *Progressive Casualty Insurance Company* case said.

Let's look at what they said in their letters to us and their letter to the Court. They said, it's going to cost

us six million bucks and 40 months or whatever they said in there. And what did the Judge say in *Nevada?* He said, that's fine, produce everything, every document hit by the search terms. You want a filter for privilege, go ahead. You want a clawback, you can have it. Just produce them all. The plaintiffs are willing to look at them. And I'll tell you right now, Your Honor, the plaintiffs in this litigation are willing to accept every document hit with a search term, we'll deal with the burden of going through for responsiveness, we'll search it on our own, we have a lot of people on our steering committee, and that was the outcome that Court ordered because the Court said it's too late, you're not going to put this on the plaintiffs at this point in the litigation.

So we believe that this is really, you know, a Battle of the Bulge kind of moment, especially where you have Mr. Greene just casually mentioning to the Court and, hey, let's see if any of the other defendants want to sign on to this. I mean, the documents are rolling out today, Judge. We were looking. We got 1620 documents from Mylan today. We got 70 pages from Teva. We have ZHP who has just told you that they are producing some documents but took that one line from your order to think, well, we hadn't collected documents.

I'm going to remind you, Your Honor, ZHP told us during the search term arguments that they had collected documents. They're on both sides of this. They keep going

back and forth with that, and by the way, they knew in December what documents to get. Coronavirus didn't hit that Wuhan Province until late January. So what were they doing for that month-and-a-half? And by the way, they've also admitted they collected documents for the US entity Solco throughout. Where are all those documents? There should be massive document productions happening today based on the order from Your Honor. We're not going to get it.

I can tell you that this is going to be nothing but a blood and guts fight from this point. I've seen it before, and that's what's happening, and this is a Hail Mary by Teva and then trying to give the other defendants the chance to jump in.

This is like when Mylan led the charge on the search terms and then when all the other defendants had to, you know, they just jumped on the bandwagon said, all right, we'll take a shot, and then what happened when that argument fell apart? They all said, yeah, I guess we can live with much better -- with different terms. That's what's happening again.

And I apologize for talking this lengthy, but I was biting my tongue through that argument from Mr. Greene. It was very frustrating. We feel like there's a real serious moment here in this litigation where we can move things forward the way Your Honor expects them to or we're going to bog down for trench warfare, and that's what's going to

happen.

Now Mr. Parekh and Mr. Jaffe are on. If I missed an important technical point, I'll certainly leave it to them to put that in, but I think that I've covered the major points of our argument.

THE COURT: Can I ask you a question -- two questions I have immediately come to mind, Counsel.

MR. SLATER: Sure.

THE COURT: One is, if the defendant Teva does not use this TAR program, hypothetically. I know the plaintiffs' preference is for them to produce every document with a hit. But in the real world, Teva is probably going to do what everybody else does in my hypothetical -- well, let's take a hypothetical of a million documents, 200,000 hits, is it plaintiffs -- is the inevitable result if TAR is rejected, that Teva has to review those 200,000 documents by hand?

MR. SLATER: Well, remember, Judge, their review, for relevance and privilege is their choice. Nobody is forcing them to do it, and again, *Progressive Casualty Insurance Company* case ordered the hit documents to be produced because the Court there said, you know, this is the end of the line, you're not getting a do-over to redo this from scratch. So if they choose to do it, they can spend the time and money, which they committed to do when they came before Your Honor a few months ago and said those search terms are too broad, we need

to narrow them because that's exactly what we're going to do.

They represented to this Court that that's what they were going to do. If they now -- and remember, Your Honor, I have the transcript from November 30, 2019, when I was imploring you and the defendant in saying, they haven't even tested yet, they're refusing to test. And that's -- this has been going on for close to a year now. And now after they made all these representations to the Court that they were going to do that and they needed to narrow the search terms, now they say, well, we don't want to do it, it's too expensive, we want to change our entire process.

You know, if they want to use TAR, I guess we'd have to stop their production for the next few months, negotiate a protocol and then we want them to run TAR on all of their documents, not just the ones that got hit with the search terms, because what they're not telling you is, with your example of the thousand documents, 500 get hit and 500 don't get hit, TAR might have picked up another 50 or a hundred or more of the 500 that didn't get hit with the search terms because it's such a better process.

And again, I'm telling you, we would have been happy to do that with them but none of the defendants wanted to do it and we knew about the other case law, we know we couldn't force them to do TAR for the production, so we didn't try to force them to do it. Now they want to put it on us at the end

without our input.

So I apologize for the long answer, but they don't need to do that. They can give us all the documents. That's their choice because they represented to the Court that's what they were going to do.

THE COURT: I thought I heard Mr. Greene say that -- I know you said that they weren't responsive to your questions in the last week or two, but I heard Mr. Greene say that they want to sit down and meet and confer with plaintiffs and hash out an acceptable, in their words, validation program. What's wrong with that?

MR. SLATER: Well, you know, I saw Josey Wales the other day. Remember the snake oil salesman, the carpetbagger on the barge? That's what I'm thinking of right now. This is legal snake oil. That's what this is. It's litigation snake oil, because what they're saying is, we know that we're beat on the law, so when they met with us on the telephone, I'm telling you, Judge, we asked the most basic questions and it was not just me, it was Mr. Parekh and Mr. Jaffe and we couldn't get answers. All we got is, we're going to send you the white papers. You saw those white papers, Your Honor, they're marketing pieces.

The only thing that's really important there is, A, the way that this system is supposed to be run, it's supposed to have multiple tags, so it's run more efficiently, and you

have that in our letter. That's what the document says. It's on Page 6 of the first white paper. Multiple tagging. They don't want to do that. They want to have one tag because they don't want to run the system at the most efficient level. They're using this to hide documents from us.

So they wouldn't give us -- they wouldn't tell us how do you define "responsive." Couldn't get that information. That's going to be our -- that's our work product. Our lawyers are going to know what to look for, they're going to do it, they're going to train the system, you have no input into it.

So they've already made that clear. Now they're saying, well, maybe we need to give something up to keep the Judge engaged, but all they're talking about is at the end of the process, they'll talk about a protocol to do sampling of -- I don't know how many documents or pages of documents they're going to push out that we're supposedly never going to see. I mean, so the answer is, it's snake oil. It's something that we should not even have to deal.

This distraction at this point is massive. The fact that we're even spending the time -- I've spent probably 20 hours on this in the last couple weeks between reading case law, writing things, meeting on the phone with Mr. Jaffe and Mr. Parekh, going through this. We have spent an enormous amount of time that we should have been spending on other

things because this should have been done so long ago.

So as those cases say, as *Mercedes Benz* says, as *Progressive* says, these are their own cases. You cannot foist this on the plaintiffs at the end of the process when now the documents are coming out and you don't like what you're seeing, and that's what we think is going on. We think they started looking at the documents that were hit and were relevant and they said, wow, this is a problem, we need a way to start to bury some documents and this is a way to do it. And I have no doubt at this point the level of cynicism I have with this process and with some of the answers the Court has heard today from the defense. What else am I supposed to think? That's what experience tells me.

And we don't want to have to go through this process, frankly, Your Honor. We don't need this distraction of dealing with them on this proposal at this point. We don't need to be spending time. We need to focus on the documents that are hitting our system right now. We need to start reviewing them and making decisions on what to put before the Court in order to figure out, did they prioritize, did they not, what's missing, do we have attachments being threaded properly. Mr. Parekh needs to focus on did they e-mail thread properly or did they not. Did they de-duplicate properly. What are we seeing in terms of the trending. All the types of analysis we need to do. We don't need this distraction. It's

completely inequitable for them to dump this on us at this point.

MR. PAREKH: Your Honor, this is Behram Parekh, can I just interject for one moment if that's all right?

THE COURT: Of course.

MR. PAREKH: In answer to your question, and more specifically, the problem is that, one, had we known TAR was being implemented, when they came back to us, we had this process in January through the last conference, we would not have made the modifications, the search terms that we would have done and, in fact, we would have expanded the search terms or not used search terms at all.

The validation process that they talk about, I'll try to hammer out in the next couple of weeks, is essentially intended from a technical level to give parties confidence that, you know, yeah, you're only missing 5 percent of the documents, you're only missing 7 percent of the documents. That's great if you're starting from the entire universe of documents. If I agree to search terms, we made all of these concessions, we already know we're missing 7 percent, 10 percent, 15 percent of the documents.

So now what defendants want us to do is agree to list an even larger percentage of documents on the stuff that hits on the search terms. That's why layering this process on top of the search terms is inequitable to plaintiffs and why we

shouldn't have to go back and agree to some other form of protocol.

THE COURT: Question for you: If this issue had been raised early in the process, before we spent so much time working on the search term issue, would there be so much of a vociferous objection? So what I'm trying to get at is, is the essence of this dispute that there is an inherent distrust of this sort of TAR program, or is it, Judge, we're too far down the line, we've invested too much time and energy to go backwards and we have other issues to devote our energies and time to, other than working on a search term issue that we already resolved. Which one is it?

MR. PAREKH: It's actually -- there's no inherent distrust with TAR as a concept, but when you use TAR on top of search terms, what you do is you compound by an order -- an exponential level the magnitude of the error. The search terms are going to list a set of documents. All of the parties understand that, which is why you negotiate search terms so heavily. TAR is going to list a certain percentage of the document. All of the parties know that, which is why you negotiate TAR the way that you do, and you get metrics and levels.

When you combine the two, when you say, okay, now that we've finished negotiating the search terms, now we want to negotiate TAR, what you're saying is, hey, out of that

15 percent that you've missed, we're now going to add another 15 percent or 7 percent or whatever the confidence level you are at of documents that we're going to miss. That gives plaintiffs 30 percent of documents that are somehow not being looked at and not being produced. That's the objection. It should be one or the other. It can't be both.

THE COURT: Question: If we --

MR. SLATER: It is both -- I'm sorry, Your Honor -- and the time and effort we've put into the search terms.

THE COURT: If we go back to square one, right at the beginning, before we invested all the time and energy of search terms and Teva had said, we're going to use TAR, plaintiff says okay, we're going to meet and confer. If a TAR program is used, do you still have to identify the custodial searches that have to be done, or it sounds impractical to say, every single person who works for Teva, their documents are going to be searched, this TAR program.

In other words, when you use the TAR, do you still have to identify the custodian you use, even though you may have narrowed it down by search terms?

MR. SLATER: No, you would search the selected custodians.

MR. PAREKH: I'm sorry, Your Honor, this is Behram Parekh. You would still have to identify the custodians because otherwise, you're searching an insane magnitude of

documents. But in using TAR, the leverage of TAR, what it allows you to be is be broader in terms of the documents that you select and potentially the number of custodians you select, although, you know, that -- you'd have to draw a fine line as to whether or not we would have asked for more custodians or not at this point.

THE COURT: All right.

MR. GREENE: Your Honor, this is Jeff Greene. If I may just respond for a minute and I promise to keep it brief.

THE COURT: Can I ask you a question or two, Mr. Greene?

MR. GREENE: Of course.

THE COURT: The record reflects that the first time Teva brought this issue of TAR up with plaintiff was July 1.

When did Teva decide to use the TAR program and was this issue contemplated even back in December, when the Court had entered its first order regarding the search terms.

MS. LOCKARD: Your Honor, this is Victoria Lockard. You know, Mr. Greene was brought in recently because of the TAR issue, so I'm going to jump in on the historical piece of this. TAR was brought up and discussed even before last November and December. It's expressly set out in the ESI protocol which allows --

THE COURT: Right.

MS. LOCKARD: -- search terms and TAR. We were

talking about this in April of 2019 when we were negotiating the protocol. The protocol says, if we decide to use it, want to use it to eliminate documents, we'll have the discussion in the meet and confer. That's what we tried to do when we decided to use it. In the interim, in November, when the parties had their meet and confer in person, conference, plaintiffs asked defendant, do you intend to use TAR. We've all reserved our right to use TAR during those conferences. The other defendants did. I haven't heard any defendant yet have an opportunity to speak, you know, we're not here to speak for them, they can do so themselves, but I've seen nothing on the record that suggests that any of them have confirmed to plaintiff that they have no intention to ever use any sort of CMML or TAR process.

So the fiction that this was just invented in the last few weeks is just not correct, it's not reflected by the record.

Secondly, to the point about, well, we never would have negotiated the search terms, we went to the Court and -- all this about, well, estoppel of the Court's ruling, the Court denied our request to modify the search terms. We had a concern with the breadth of the search terms. We brought it before the Court. The Court denied it. The Court said the parties can work it out. The parties got together, we got some minor concessions from plaintiffs' counsel on some of

these search terms, but I can tell you it made a small dent.

When we looked back, we ran all of the searches under the new revised lightly modified search terms, we're still looking at Teva. The last number I saw was something on the order of, you know, close to 4 million documents. To expect us to put eyeballs on all of those, you know, in the timeframe that was provided was not reasonable. That's when we started looking at this TAR. I'm not an expert on it. We brought in Mr. Greene at that point. This has all happened in the last month.

We got our experts on it, we talked to our ESI vendor about it and we disclosed it, you know, before we even had to, to Mr. Slater and to Mr. Parekh. We said, look, we're not using this to set aside or hide documents, we said we're going to use this to help get to the documents we need to get to so we can make our deadline and they still objected.

So I just wanted to speak to that history and I'll turn it back over to Mr. Greene and I apologize for jumping in there.

THE COURT: I do have a point. Hold on one second, Ms. Lockard. I have the ESI protocol in front of me now.

In Section 2 of the protocol, you're correct. It mentioned the TAR predictive coding. It says: "The parties will cooperate in good faith," blah, blah, blah, blah, blah, blah, "prior to using TAR."

Then it says: "The parties agree to meet and confer, quote unquote, as early as possible to discuss search methodology, including TAR." Okay? That's what the -- that's what the order said. It's undisputed that the first time this issue was brought to plaintiffs' attention was July 1. Why wasn't it brought to plaintiffs' attention earlier?

MS. LOCKARD: The ESI protocol says that search terms and protocols and any TAR/predictive coding will be discussed -- disclosed prior to using any such technology to narrow the pool of collected documents to -- as set under their review.

I just want to make sure that the record is clear on that, that that provision requires us to do that prior to narrowing the pool, which we're not doing or -- which we haven't done to date. And by the way, that's what we told plaintiffs' counsel we had not done to date on our phone call.

In terms of why we didn't bring it to their attention before July 1st is because it wasn't until the end of June that we knew we would use this in order to prioritize the most relevant and pertinent documents for this review process. It was offered to us by our vendor that -- when we are struggling with the sheer volume of the documents, it was offered as a tool, just an additional tool to facilitate the review.

THE COURT: Okay. So --

MR. GREENE: Your Honor, this is Mr. Greene, if I could just make a quick couple of points here.

THE COURT: Go ahead, Mr. Greene.

MR. GREENE: And I promise I'll keep it brief. You know, there are -- I think Mr. Slater's inexperience with TAR is telling, because he's unable to distinguish cases, you know, cases that were TAR 1.0 versus 2.0, for example. The *Progressive* case is -- he can cite to that but, you know, there was no continuous learning, that was a TAR 1.0 case so the process was very different. There was no ESI -- there was no TAR reference or predictive coding reference in the ESI protocol in that case, and I think that's significant because we do have one in this case, and then I think more importantly, and Mr. Slater can insult me as much as he wants, he does not know me, I've been doing this a long time and he can call me a snake oil salesman, but the reality is, in that case, Progressive was unwilling to engage and be transparent, whereas we are and they've just said no.

What we heard, Your Honor, was words from Mr. Slater like "mischief" and "insidious" and "grand conspiracy." We heard lots of histrionics, but the fact is, he cannot fight the presumption, the black letter law that says we get to chose the review and the search and review methodology, that is beyond doubt, and whether it's *Mercedes Benz*, whether it's *Hyles versus New York City*, 2016 Westlaw 4077114 -- Hyles, H-Y-L-E-S, versus New York City. The *Rio Tinto* case again, that was a 1.0 decision, a TAR 1.0 decision where there were

seed sets and it made sense for the parties to work together on those seed sets. With a Continuous Active Learning process, we're just reviewing documents and there's no reason for us to be sitting side by side.

I think a fundamental premise that we have here is that, you know, the plaintiffs are -- they're spending a lot of time making up numbers. We heard 15 percent, we heard 20 percent, we heard 7 percent, and were reducing the sets, but they have no support for that, and at the end of the day, you know, they cannot possibly dispute that a technology-assisted review process is going to be more reliable and more accurate than a linear review.

And the same decision that they want to see as part of a TAR exercise, they don't get to see in terms of a linear review. So if I have a review attorney, if one of my associates is reviewing a document and they make a decision on what relevance is and Mr. Slater can say that we never gave him the definition of relevance, which we did, so that's false. We said that, you know, the definition, Rule 26 should give us a boundary and that should be the claims and defenses, documents or information relating to the claims and defenses. And if I have an attorney looking at that document, they make a decision, does this document relate to the claims and defenses of that case.

And I suppose another set of guideposts would be the

documents that -- the document request that we received. Though it is a multi-layered analysis, we look at it from the perspective of claims and defenses and we look at it specifically with respect to the document request. There's no grand conspiracy here, Your Honor. I mean, we're sort of stunned that plaintiffs have taken this position and they've reacted in this way because, you know, they're saying that we want to bury documents. They have no support for that.

They say that, you know, we don't like what we're seeing so we're suddenly engaging in a TAR process. They have no support for that, and Mr. Slater can engage in whatever histrionic he prefers, but the fact is, they have no proof for any of the statements they're making.

At the end of the day, we're happy to engage in a transparent process but they're afraid to do so and, Your Honor, when you asked Mr. Slater the very pointed question, what's wrong with sitting down and meeting with them, he couldn't give you an answer, and I'll stop there, Your Honor.

THE COURT: Mr. Greene, I have two questions of you. One, did you report to any -- can you cite me to any recorded case that talks about TAR 2.0? Do you have experience using TAR 2.0 in other cases, especially MDL cases? That's one.

And, two, if it's so burdensome to put eyeballs on all of the responsive documents, why aren't the other defendants complaining that they also want to use TAR? And

it's like silence. I'm taking that as an implicit acknowledgement that they're going to put on -- put eyeballs on their hit documents -- well, their internal, quote unquote, hit documents, I don't think --

MR. GREENE: I can answer that, Your Honor.

THE COURT: I don't think that the burden -- how do I say this? What I'm trying to say is with regard to the number of hits, I don't think they're going to be disproportionately larger for Teva than it is for some of the other defendants.

So why aren't they complaining about a burden, and Teva says they have to use TAR.

MR. FERRETTI: Your Honor, this is Joe Ferretti on behalf of the ZHP defendants. I acknowledge that it may be an appropriate time for me to speak up in light of your comments.

The ZHP defendants aren't planning to use CAL in the same way that Teva is proposing. However, we are intending at some point to use it. Right now, we're simply doing a linear review of the custodians who the plaintiff has asked us to prioritize, and at some point very soon after all of our data is processed and de-duplicated and finally in -- 100 percent in the system, we will be flipping on the switch for Continuous Active Learning.

I don't view Continuous Active Learning as being the same thing as what the ESI protocol is referring to. That refers to TAR/predictive coding. We're not intending to do

any predictive coding. We're intending to use CAL in order to prioritize the documents that are batched out for review for our reviewers, so the CAL system will simply decide which documents it thinks are most likely to be responsive and it will immediately batch those out for review, and based on the number of documents that we've reviewed so far in the system, we expect it to be very good results early on. We expect there to be some, you know, very good number of responsive documents being front-loaded in our review and produced.

And at some point down the line, we expect there may be a time where the responsiveness rate becomes just abysmally low. As it is, the responsiveness rate that we are encountering is somewhere in the neighborhood of 7 percent. That is a very low responsiveness rate. So seven out of every hundred documents we're finding that we're reviewing are actually responsive to the document request and we expect that at some point, it's going to be much, much lower because of the use of CAL, and at that point we would approach with plaintiffs and say, what do you want to do here, because we have a very low responsiveness rate and at this point we believe it's disproportional in terms of our level of effort needed to review the remaining number of documents given the one out of every thousand or one out of every 2,000 documents we're finding to be responsive.

And at that point, we can talk to plaintiffs about

what measures to take, whether we need to shift costs for plaintiffs to bear the cost going forward or whether we need to narrow or focus in on certain things and let the others go. That's the way I envision using it. It's a common way to use it, as I understand it, and it shouldn't be -- come as any surprise. It's not -- we're not using it in the way of -- in the way of predictive coding or in the way of trying to rank documents to -- exclude documents based on rank. We're hoping to use it simply to determine when we've gotten through the vast majority of what will be the responsive documents in the set.

And so my hope is, Your Honor, that whatever comes of today, we're not joining in any motion today, we're not a party to any arguments, but what I'm hoping is that whatever decision Your Honor makes today won't preclude our intention -- or preclude us on behalf of the ZHP defendants from applying that approach.

THE COURT: Thank you, Counsel.

MR. GREENE: Your Honor, to answer your question, I think Question 2 just got answered taking them in reverse, you know, as two, why isn't anyone else doing it, you know, why aren't the other defendants. I can't speak to their datasets, they may have a smaller number of custodians and, you know, they may have different document retention policies in place related to e-mail and so on, so there are any number of

factors that could affect the number of hits that are -- the number of documents that an individual custodian has. So I don't think it's, you know, comparing one defendant to another is an apples-to-apples comparison.

I think your first question was, do I personally have any experience with CMML. Yes, I've been doing this for quite some time, so the answer to that is yes.

Do I have experience in CMML in an MDL setting, the answer to that would be no, but I know Consilio our vendor does, but I'm not sure -- I think that's a little bit of a distinction without a difference in terms of -- a complicated case is a complicated case.

You use these -- typically, you use technology-assisted review, this CAL exercise, which we're really talking about in the context of a case with a large volume of record, and those are typically larger cases with larger, you know, with larger dollar values at stake. So I'm not sure the MDL -- except the fact this is an MDL is an issue, at the end of the day, it's really more the size of the case and the number of documents that you are dealing with.

MS. LOCKARD: If I can just add one additional point to the questions on the table. Again, Victoria Lockard.

Just to remind the group and Your Honor, you know, when we discussed the progress of the parties with their discovery responses back in April and the Court entered the

order about the July 15th date being set in stone. You may remember we discussed -- many of the defendants had been focusing their efforts on noncustodial documents because for whatever reason, those were -- you know, that was their focus, that's what they went after, and we disclosed at that point that we, Teva, had already loaded a number of custodians up on our vendor's platform. I believe we were the only defendant who had done that at that time and others were focusing on noncustodial pieces. So that's not to compare apples to oranges there.

But the point being, we focused our efforts as we rightly were entitled to do so, on the custodial piece and that's why we're out ahead on this issue. It's not because we stand, you know, out of alignment with anyone, it's because we're first in the line in terms of getting the most custodians loaded on our vendor's platform.

THE COURT: Okay.

MR. STOY: And, Your Honor, if I may, to piggyback on that point. This is Frank Stoy, S-T-O-Y, on behalf of the Mylan defendants. I think that we are also considering the use of a TAR 2.0 Continuous Active Learning tool for our custodial document review.

As Ms. Lockard just alluded to, the documents that we produced to plaintiffs today were noncustodial, but whether we ultimately take an approach similar to that which Mr. Greene

has described or that which Mr. Ferretti talked about for ZHP, we haven't yet determined, but we are analyzing those options.

THE COURT: Okay.

MR. SLATER: Your Honor, it's Adam Slater. I'm sorry, just very briefly.

THE COURT: Go ahead.

MR. SLATER: So now you see the virus spreading and that's what's happening. I mean, that's what's happening. I would love to see the e-mails between these various attorneys where they're saying, well, take a shot, that's why we're salesmen, we want to be able to have the opening to do this too, now.

You asked a question and you won't find an answer to the question of, is there a TAR 2.0 case. Counsel didn't identify one, and he's certainly not going to identify one where it was ordered to be used in conjunction with search terms, because it's not done that way. So they didn't want to do TAR because they knew that if they did it -- remember, Mr. Greene is a member of the Greenberg Traurig firm. He's been there the whole time, presumably he's known the whole time how clunky and terrible search terms is as an approach, so why did they want to agree to that, because they didn't want to have TAR run the way it's supposed to be which is with a full process of vetting with involvement like an *Actos* where both sides actively review the documents together and

determine responsiveness together against all of the document sets for all of the custodians. They didn't want to do that.

Now they're taking the shot. It's obvious why everybody is jumping on the bandwagon now, Your Honor. We implore you -- you know, we just heard ZHP say 7 percent of the documents are responsive. We're going to have big battles to fight about why so many documents are being held back, if they're going to try to tell us that there's 93 percent of -- documents hit with search terms are not actually going to be produced. So we ask you, Your Honor, to just put to this bed today. They can't do this. This is going to be a fight that is going to take over this litigation, and there's no way around it. There's no way to introduce TAR in a meaningful and fair way this late in the litigation.

THE COURT: Okay. Counsel, we've been at this a long time and I still think my initial reaction was correct, that I'm not prepared to make a ruling on this issue today, but, I do think it's appropriate to issue in effect a, quote unquote, stay order that, and it doesn't sound, from what I understand Mr. Greene to say, that we've reached the point in the review where any documents are being excluded. We haven't reached that point yet, so in effect, I think it's appropriate to have a standstill and I'll somehow wordsmith this to say that.

You can continue with your TAR and all your reviews and that, but until the Court rules on this issue, no party

can exclude any documents from review because of the TAR program until the Court rules on this issue.

I think the parties' briefs were extremely comprehensive. Oral argument certainly was. I don't know, does anyone think there's anything to add to the record on this issue that they want to add before the Court digests this and rules on it?

MR. PAREKH: Your Honor, this is Behram Parekh. At the risk of saying yes, I do -- would like to add two items.

THE COURT: Okay. If anybody wants to add anything to the record on this, can you just submit it in a week?

MR. PAREKH: Your Honor, this is just really brief and it's in response to your point that they can continue to use Continuous Active Learning for prioritization, and the points that I would just make are -- and I'll keep them brief.

The first is when TAR -- when Continuous Active Learning is used for prioritization, what it does is, the way the system works is, as it's trained by people selecting things that are relevant and not relevant, what it does is, it prioritizes the most commonly hit relevant documents.

So what it means to the end are usually short documents that tend to be relatively, you know, short e-mails and -- but those may be incredibly relevant.

What it also does, the way I understand Greenberg Traurig to be using it and the way I understand other

defendants to be using it, it's run across the entire spectrum of custodians and therefore, as we get closer to doing depositions, plaintiffs will never know if any particular custodial documents are complete, because the way the TAR system works is, it doesn't care which custodian is being produced, it runs them across them and it says these are the documents that I think are hitting the most from what people are saying, this is relevant. And so it makes it much more difficult for us to start taking depositions because we will not have complete custodial files until the very end of all production. I just wanted to bring those two items to your attention, Your Honor.

THE COURT: But do you agree with me that if the Court enters this standstill order, that no documents are to be removed from review pursuant to this program until the Court rules on this issue, plaintiff is not going to be prejudiced. Do you agree with that or disagree with that?

MR. PAREKH: I do, Your Honor. I just wanted to make the point that the standstill just preserves it for this particular instance and we could still face prejudice if it continues to be used going forward.

THE COURT: You believe, you and Mr. Slater have said it very well, you believe the plaintiffs will be prejudiced if the Court permits the defendants to remove from review documents using a TAR program.

The Court's order is going to say you can't do that until the Court rules on this issue. I don't know how I'm going to rule on this issue, so I'm -- I'm just trying to give some comfort to the plaintiffs that defendants can continue to do what they're doing, but they're not going to remove any documents from review until at least the Court rules on the issue.

That's the Court's intent.

MR. PAREKH: Your Honor, I understand that Your Honor might. My only point was that it will end up prejudicing our ability to take complete depositions at some point in the future if it's allowed to continue with -- the way it looks like Greenberg and other firms are implementing this, because we will not be assured of complete custodial productions.

THE COURT: Well, isn't the production going to be done in November? Isn't that the outside date? So you're going to get everything by November, right?

MR. PAREKH: At that point, then I think we have no issue.

MR. SLATER: Let me just interject, Your Honor, it's Adam Slater. The issue is this, we have to deal with the briefing on the motions to dismiss. So if this methodology is used, it's going to deprioritize critical documents that we have prioritized. So we're not going to get them potentially until after all the briefing is done on the motions to dismiss

where those documents could actually have a significant impact on the briefing. We're asking -- we object to this completely so they can't do it at all.

THE COURT: Mr. Slater, you know as well as I do that they can't use discovery documents outside their pleadings for the Rule 12 motions and neither can the plaintiffs, right? So it's really irrelevant what the documents say, right?

MR. SLATER: I'm not sure about that, Your Honor. I mean, they're going to -- but we don't know what they're going to say in their motion. We think they're going to -- we don't know how their arguments are going to be framed, but if we have a document that shows that one of our claims is valid, I think it would be -- it's potentially going to be presented.

I mean, there's obviously rules about when documents outside the pleadings can be utilized and whether they're quoted or whether they are incorporated by reference. I mean, we know those cases, so I wouldn't want to foreclose that. I think the data -- the defense has -- they're in a straightjacket to a larger extent where they open the record and turn this to a, quote unquote, summary judgment motion and then the Court can then defer the whole thing until the end of discovery, which is maybe where we'll end up procedurally on some of this.

I mean, I can't presuppose everything, but we have the right to get these documents to us -- produced in a

priority fashion as Your Honor ordered them to comply. We were told, yeah, we're going to comply, and now this system will change the way documents come out to us.

MS. LOCKARD: Your Honor, the motion to dismiss is due in two days. I would submit that if there are documents that Mr. Slater thinks he needs to respond to our motion to dismiss outside of the four corners of the pleading, you know, I think that will -- we can address that at a later time, but I'm fairly confident that will not happen. We do not intend to convert this to a motion for summary judgment.

THE COURT: That's what I'm assuming, but I guess we'll have to see. We'll cross that bridge when we come to it. But we all know the difference between a Rule 12 motion is and a Rule 56 motion.

MR. GREENE: Your Honor, if I may, it's Mr. Greene, Jeff Greene here, and I apologize for interrupting.

You offered to consider additional information, Your Honor, and we're happy to put together a couple -- and some case law because I think it seems that plaintiffs would have you believe that it's either TAR or search term but not both, and there are a number of cases, large cases, and I've cited to the In Re Boiler -- In Re *Broiler Chicken* antitrust litigation where that was -- specifically, there was a TAR protocol entered in that case which specifically addressed, you know, handled the search term TAR on top of search term

issue, so we're happy to provide the Court with that authority to see, so that there's no concern from the Court's perspective on our approach here by using searches -- by using search terms in the first instance and then CAL on top of that. So if we could have a few days to put that together, we'd appreciate it.

THE COURT: My order is going to say, if anybody wants to submit anything else, do it within a week.

So sort of to sum up where we are today, way back when, we started with granting the downstream defendants' request for extension of time. That will be confirmed in a Court order, and then we talked about the individual defendants' document production, and based upon what we heard, I anticipate we're going to hear disputes about that.

And then the bulk of the time was spent on this TAR issue where the Court is going to fashion an order to in effect say, there's a standstill, and then one week to submit due authority you want the Court to review and then the Court will rule promptly, hopefully, on this issue.

In the meantime, given the Court's order which is going to, in effect, have a standstill, defendants are not prejudiced, they can do what they're doing, let the computer learn, and plaintiffs are not prejudiced because right now, until the Court rules, no documents are going to be excluded from review.

So that's what we're going to do until the Court -- this is not a simple issue, there's equities on both sides and the Court has to evaluate that.

All right, counsel, for the good of the order, anything else we need to address?

MR. SLATER: No, Your Honor. Thank you.

RESPONSE: No, Your Honor, thank you.

THE COURT: Thank you, Counsel. We are now adjourned.

(6:05 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Karen Friedlander, CRR, RMR
Court Reporter/Transcriber

July 17, 2020
Date

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